

RESPONSE REQUESTED

ORIGINAL

No. 89-5900

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Supreme Court, U.S.

FILED

MAR 1 1990

JOSEPH F. SPANIOLO, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1989

JOHN E. RUST,

Petitioner,

v.

FRANK O. GUNTER, HAROLD W. CLARKE,
GARY GRAMMER, FRANCIS X. HOPKINS,
MARIO PEART, JOHN T. EGGERS, ROGER
PEHRSON, DOUGLAS ADAMS, ROBERT
BENSON, TERRY KIENE, RUSSELL
SCHUSTER, MICHAEL R. FORD, KARL
EISBACH, each individually and in
their official capacities, NEBRASKA
STATE PENITENTIARY HOUSING UNIT #4
CORRECTIONAL OFFICERS/CORPORALS, each
individually and in their official
capacities, NEBRASKA STATE PENITENTIARY
CLASSIFICATION COMMITTEE MEMBERS, each
individually and in their official capacities,

Respondents.

RECEIVED

MAR 1 1990

OFFICE OF THE CLERK
SUPREME COURT, U.S.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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on Behalf of Respondents.

QUESTIONS PRESENTED

Did the United States Court of Appeals for the Eighth Circuit correctly affirm the district court's dismissal of petitioner's civil rights complaint upon a determination that allegations that petitioner's segregated confinement on death row violated his constitutional rights failed to state a claim?

LIST OF PARTIES

The petitioner in this action is John E. Rust, an inmate incarcerated at the Nebraska State Penitentiary on death row.

The respondents in this action are Frank O. Gunter, Director of the Nebraska Department of Correctional Services; Harold W. Clarke, Warden of the Nebraska State Penitentiary; Francis X. Hopkins, Deputy Warden of the Nebraska State Penitentiary; Mario Peart, Housing Unit Administrator of the Nebraska State Penitentiary; John Eggers, Roger Pehrson, Douglas Adams, Robert Benson, Terry Kiene, Russell Schuster, Michael R. Ford, and Karl Eisbach, Housing Unit #4 Correctional Officers/Corporals and Unit Management staff; and Nebraska State Penitentiary Classification Committee members, all of whom are officials and employees of the Nebraska Department of Correctional Services.

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OPINIONS BELOW

This is a Petition for Writ of Certiorari from an unreported decision entered by the United States Court of Appeals for the Eighth Circuit on September 21, 1989. This decision affirmed the June 16, 1988 unreported order of the United States District Court for the District of Nebraska dismissing petitioner's complaint for failure to state a claim. That order was based upon the Report & Recommendation of the United States Magistrate filed February 22, 1988. Each of these decisions are included by petitioner in his appendix.

JURISDICTION

The district court had jurisdiction over this matter pursuant to the provisions of 28 U.S.C. § 1331.

The United States Court of Appeals for the Eighth Circuit had jurisdiction over this matter pursuant to the provisions of 28 U.S.C. §1291.

This Court has jurisdiction over this petition pursuant to the provisions of 28 U.S.C. § 1254.

STATEMENT OF THE CASE

Petitioner filed this civil rights action pursuant to 42 U.S.C. §1983. Petitioner is an inmate at the Nebraska State Penitentiary (NSP) and is residing on death row in that facility.

The respondents are officials and employees of the Nebraska Department of Correctional Services (DCS).

Petitioner was sentenced to death by a three-judge panel of the District Court of Douglas County, Nebraska, in October, 1975. Petitioner was transported to the NSP, where he has remained incarcerated to the present date. From petitioner's arrival at the NSP in October, 1975, until October, 1978, prisoners sentenced to death were allowed to reside in the general population of the prison. In October, 1978, prisoners sentenced to death were removed from the general population and placed in administrative segregation.

Nebraska Revised Statute § 83-4,114 (Reissue 1987), first enacted in 1976, authorizes prison officials to place inmates in

solitary confinement "for purposes of institutional control." Petitioner alleges that in November, 1984, NSP officials promulgated "schedules" which resulted in solitary confinement of death row inmates. Thereafter, NSP officials promulgated Rule 6(16) which essentially mirrored the Nebraska statute authorizing solitary confinement for purposes of institutional control.

On November 29, 1988, petitioner filed a civil rights complaint challenging the authority of prison officials to place him in segregated, solitary confinement solely on the basis of his being sentenced to death. Petitioner specifically claimed that his confinement on death row violates his right to due process and equal protection under the Fourteenth Amendment, the prohibition of cruel and unusual punishment under the Eighth Amendment and the prohibition of ex post facto laws.

The district court, adopting the detailed report of the magistrate, dismissed the action pursuant to 28 U.S.C. § 1915(d). The respondents were never served with the complaint.

Petitioner then appealed this dismissal to the United States Court of Appeals for the Eighth Circuit. The Eighth Circuit found that the district had properly dismissed the complaint sua sponte and affirmed. In affirming the district court, the Eighth Circuit cited its recent decision in Palmer v. Gunter, No. 88-2245 (filed May 24, 1989) (unpublished per curiam), wherein the Eighth Circuit addressed identical issues. In that case, the Eighth Circuit stated:

We believe the district court correctly concluded that death row inmates in Nebraska have no liberty interest in being confined in the general prison population. As the court noted, the United States Constitution does not create a protected liberty interest in remaining in the general prison population, but a state may create such an interest through its own constitution, statutes, regulations or judicial decisions... In the instant case an NSP prison regulation expressly mandates that individuals sentenced to death will be automatically placed on administrative detention status and housed in a separate wing of the prison... Accordingly, [Petitioners'] due process claim must fail...

[Petitioners] also argue that it is a violation of the equal protection clause to treat them differently than other inmates solely as the basis of a death sentence. The district court correctly found no such violation as the stated reasons for segregation of death row inmates, prevention of suicide attempts and escapes,

and the security and good order of the institution, are rationally related to the NSP's policy concerning these inmates...

The district court also correctly concluded that the ex post facto clause is not implicated by the imposition of solitary confinement on death row inmates because the purpose of such placement is to enhance the orderly administration of the institution and does not constitute an additional punishment.... Finally, the district court was correct in concluding that a death row inmate's solitary confinement is not a per se violation of the eighth amendment.... (citations omitted).

[See Petitioner's appendix, id. at 3-4].

The petitioner filed this petition for Writ of Certiorari appealing the Eighth Circuit's affirmance of the dismissal of his complaint. The Nebraska Attorney General's office appears as Amicus on behalf of the respondents because the respondents were never served with the complaint.

REASONS FOR DENYING THE WRIT

I.

THE EIGHTH CIRCUIT COURT OF APPEALS CORRECTLY AFFIRMED THE DISTRICT COURT'S DISMISSAL OF PETITIONER'S COMPLAINT FOR FAILURE TO RAISE A CLAIM.

In filing his civil rights action, petitioner essentially challenged the authority of prison officials to segregate capital inmates from the general prison population. Petitioner raised procedural and substantive challenges to the constitutionality of his confinement on death row under the Ex Post Facto Clause, the Due Process and Equal Protection Clauses of the Fourteenth Amendment and the Cruel and Unusual Punishments Clause of the Eighth Amendment. The district court, adopting the detailed analysis of the magistrate, correctly concluded that no constitutional claim was raised in the complaint. There being no abuse of discretion, the Eighth Circuit's affirmance of the dismissal of petitioner's complaint was in all respects proper.

A. Ex Post Facto Clause.

Neb. Rev. Stat. § 83-4,114 expressly authorizes the segregation or isolation of any inmate "for purposes of institutional control." Prison Rule 6(16) mirrors this statute and, as quoted by petitioner, specifically states that "[n]o offender shall be placed in solitary confinement for disciplinary reasons." Petitioner

asserts that the promulgation of § 83-4,114 and Rule 6(16), both enacted after the occurrence of his crimes in 1975, violate the Ex Post Facto Clause. Yet, petitioner cites no preexisting statute or rule which would have prevented prison officials from placing inmates in solitary confinement for purposes of institutional control.

This Court, in Rooney v. North Dakota, 196 U.S. 319, 325 (1905) defined an ex post facto law as one creating a new offense, aggravating or increasing the enormity of the crime for the commission of which the accused was convicted, or requiring "the infliction upon the accused of any greater or more severe punishment than was prescribed by law at the time of the commission of the offense."

The segregation of petitioner and other capital inmates does not impose an additional punishment or enhance the severity of his sentence. The complaint itself notes that the respondents' rationale for placing death row inmates in administrative segregation is to enhance the control and safety of the prison in view of the greater risk of attempted escapes and suicides for inmates under sentence of death. It is obvious that the challenged rule and statute are "reasonably related" to maintaining the safety and health of inmates and employees of the penal institution.

Petitioner has misinterpreted Ex Parte Medley, 134 U.S. 160 (1890) as a prohibition against solitary confinement because this Court viewed it as an increased punishment. A careful reading of the case reveals that the decision was based on this Court's determination that a newly enacted Colorado statute, which became effective after the defendant's commission of the crime but before sentencing, repealed the former statute and all statutes which were inconsistent with the new statute. Thus, the defendant could not be convicted or sentenced since the former statute had been repealed and a statutory basis for sentencing no longer existed. Id. at 166. The discussion of solitary confinement in Ex Parte Medley was dicta and intimately connected with the Colorado statute

of 1889. The newly enacted statute mandated the use of solitary confinement for inmates sentenced to death, as a punishment.

The factual situation of petitioner's case makes it readily distinguishable from Ex Parte Medley since his conviction and sentence were not based on a new statute to which the State attempted to give retroactive application. Moreover, the challenged Nebraska statute and prison rule do not mandate the use of solitary confinement of death row inmates as a punishment, but authorize its use for any inmate for purposes of institutional control.

Petitioner similarly misconstrues this Court's ruling in Weaver v. Graham, 450 U.S. 24 (1980). In that case, a state statute which reduced the amount of "gain time" deductible from a convicted prisoner's sentence, as applied to persons whose crimes were committed prior to the statute's enactment, was determined to be an unconstitutional ex post facto law. There, the effect of the statute was to increase the term of petitioner's sentence.

The clear aim of the challenged Nebraska statute and prison rule is to allow prison officials to regulate the internal affairs of the institution and to enhance the safety and control of the prison. Inmate assignments to residence units in administrative segregation are based on status, not conduct, within the institution. Thus, the district court and Eighth Circuit correctly determined that the placement of petitioner in solitary confinement on death row does not constitute an additional punishment. Rather, such confinement is an "alteration in the conditions deemed necessary for the infliction of humane punishment" and is not violative of the Ex Post Facto Clause. Malloy v. South Carolina, 237 U.S. 180, 183 (1915).

B. Due Process.

In his complaint, petitioner asserted two due process claims. First, he claimed a liberty interest in being classified initially as any other inmate, with possible placement in general population. Second, petitioner asserted a right to "meaningful review" of his status by prison officials with a view toward placement in the

prison's general population and/or the granting of greater privileges.

The district court correctly concluded that no Nebraska statute or prison rule created any protected interest in being placed or remaining in the general population. See, Hewitt v. Helms, 459 U.S. 460, 468 (1983). To the contrary, language in prison rules cited by petitioner expressly mandate that capitol inmates will be placed on administrative detention status and housed in a separate wing of one of the prison's housing units.

Petitioner asserts that, on appeal, he is only raising the issue of whether he is entitled to "meaningful review" of his status to determine whether he should be granted "greater privileges." He does not assert any facts as to what these privileges are or why he is entitled to them. In his complaint, petitioner asserts that he has the opportunity to appear before a segregation status review committee on a monthly basis and receives an annual classification review. Petitioner contends, however, that these reviews are not "meaningful" because his continued administrative detention is assured solely on the basis of his death sentence.

The district court correctly determined that, as a capitol inmate, petitioner had no protected interest in not being confined in administrative segregation. It follows, therefore, that petitioner has no protected interest in being granted "privileges" inconsistent with such a status.

C. Equal Protection.

In his complaint, petitioner additionally claimed that the placement of capitol inmates in segregated confinement by NSP officials denies him equal protection. The petitioner does not specifically address this issue on appeal to this Court.

Because the petitioner did not assert the existence of any suspect class or fundamental right, the district court analyzed this claim under the rational basis test. Noting that the complaint itself asserted that the objective of prison officials in segregating capitol inmates is to prevent attempted suicides

and escapes, the district court determined that segregation of these inmates was reasonably related to the legitimate governmental objective of prison security. Thus, no equal protection claim was asserted.

D. Eighth Amendment.

Petitioner contends that his administrative confinement on death row is without penological justification because prison officials have created an "irrebuttable" presumption that capitol inmates pose a greater security threat, rather than making a case by case evaluation. The district court properly noted that the Eighth Amendment did not require an individualized determination since, given the qualitative difference of death from other punishments, the segregation of capitol inmates as a class cannot be said to be without penological justification.

It is noteworthy that petitioner did not allege in his complaint that the conditions of his confinement amounted to cruel and unusual punishment. Although petitioner freely and mistakenly uses the term "solitary confinement" to describe his confinement, he asserts no other facts about the conditions of his confinement. The district court properly emphasized that segregation, even involving solitary confinement, is not per se unconstitutional. Hancock v. Unknown United States Marshal, 587 F.2d 377, 378-79 (8th Cir. 1978). It is noteworthy that in a prison grievance response, attached by petitioner to his complaint, petitioner is informed by the Director of the DCS of the following:

You have not been placed in solitary confinement. Because you have been sentenced to death, your housing assignment is not within the general population of the Penitentiary. You are permitted to associate with other inmates who have sentences similar to yours. At this time, I do not intend to alter this Department's policy concerning housing assignments for inmates under sentence of death.

[Appendix, at p.48].

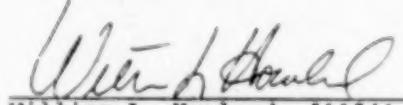
Petitioner failed to allege facts to support a claim that the totality of physical conditions of his confinement amounted to cruel and unusual punishment. Petitioner's claim that his segregated confinement serves no penological purpose is equally

without merit. The lower courts did not err in concluding that petitioner failed to raise any claim under the Eighth Amendment.

CONCLUSION

The district court correctly dismissed petitioner's complaint for failure to assert a claim. Petitioner's complaint essentially raised questions of law only, which were properly analyzed and reviewed by the district court. The Eighth Circuit Court of Appeals properly determined that no constitutional claim is raised by the segregation of death row inmates from prisoners in general population. Petitioner points to no conflict or controversy among the federal circuit courts. No substantial federal question is presented. For all of the reasons set forth above, amicus curiae on behalf of respondents respectfully requests that this Court deny petitioner's Petition for Writ of Certiorari.

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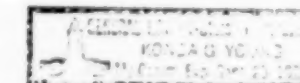
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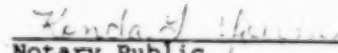
STATE OF NEBRASKA)
COUNTY OF LANCASTER) ss.

I, _____, being first duly sworn, depose and state that two copies of the brief in the above entitled case were served upon the petitioner by depositing said copies in the United States Mail, certified and return receipt postage prepaid, addressed to petitioner, John E. Rust, Nebraska State Penitentiary, P.O. Box 2500, Lincoln, NE 68502, on this ____ day of February, 1990.

Affiant

Subscribed in my presence and sworn to before me this ____ day of February, 1990.




Notary Public

23-320-7

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JOHN E. RUST,

Plaintiff,

-vs-

FRANK O. GUNTER, Individually, and as
Director of Correctional Services;
HAROLD W. CLARKE, Individually, and as
Warden of Nebraska State Penitentiary;
GARY GRAMMER, Individually, and as
Warden of Nebraska State Penitentiary;
FRANCIS X. HOPKINS, Individually, and
as Deputy Warden of Nebraska State
Penitentiary;
MARIO PEART, Individually, and as
Nebraska State Penitentiary Housing
Unit Administrator;
JOHN T. EGGERS, Individually, and as
Nebraska State Penitentiary Housing
Unit #4 Manager;
ROGER PEHRSON, DOUGLAS ADAMS and ROBERT
BENSON, Individually, and as Nebraska
State Penitentiary Housing Unit #4
Unit Supervisor IIs;
TERRY KIENE, RUSSELL SCHUSTER, MICHAEL
R. FORD and KARL EISBACK, Individually,
and as Nebraska State Penitentiary
Housing Unit #4 Unit Supervisor Is;
NEBRASKA STATE PENITENTIARY HOUSING
UNIT #4 CORRECTIONAL OFFICERS/COR-
PORALS, Individually, and as Correc-
tional Officers/Corporals;
NEBRASKA STATE PENITENTIARY CLASSIFICA-
TION COMMITTEE MEMBERS, Individually,
and as Members of the Institution Class-
ification Committee;

Defendants.

INTRODUCTION

This is a civil action, authorized pursuant to 42 U.S.C. §1983,
by plaintiff John E. Rust, a state prisoner under a sentence of
Death and three sentences of 16 2/3 years to 50 years, to redress
the deprivation under color of state law, regulation, custom and/or

REC- 10
NOV 28 1988

U.S. MAGISTRAL.

Civil No. CV 88-L-675

FILED DISTRICT OF NEBRASKA AT _____ NOV 29 1988-2 William L. Olson, Clerk By _____ Deputy

CIVIL RIGHTS COMPLAINT
FOR DECLARATORY AND
INJUNCTIVE RELIEF

usage, certain rights, privileges, and immunities secured to the plaintiff by the Constitution of the United States.

JURISDICTION

1. Original and specific jurisdiction over this civil rights action is conferred on this Court pursuant to 28 U.S.C. §1343 providing for jurisdiction over claims arising under 42 U.S.C. §1983, and 28 U.S.C. §§2201 and 2202 relating to declaratory judgments.

PARTIES

PLAINTIFF

2. Plaintiff John E. Rust is, and at all times relevant herein has been, a prisoner of the State of Nebraska in the custody of the Nebraska Department of Correctional Services, and he is confined in the Nebraska State Penitentiary located at Lincoln, Nebraska, under a sentence of Death and three sentences of 16 2/3 years to 50 years.

DEFENDANTS

3. Defendant Frank C. Gunter (hereinafter referred to as "Gunter") is, and at all times herein relevant has been, the Director of the Nebraska Department of Correctional Services (hereinafter referred to as "NDCS"). He is responsible for the custody, control, and correctional treatment of persons committed to the NDCS and is also responsible for the general administration of the NDCS pursuant to Neb. Rev. Stat. §§83-108.02, 83-171, 83-173, 83-176, 83-178, 83-179, 83-182, 83-922, 83-4,109 to 83-4,123 (Reissue 1987), 29-2204, 29-2519 et seq. (Reissue 1985), the Rules and Regulations of the NDCS, the State of Nebraska Department of Correctional Services Adult Inmate Classification Manual (hereinafter referred to as the "Custody Classification Manual"), and the Con-

stitution of the United States. Defendant Gunter is sued in his individual and official capacities.

4. Defendant Harold W. Clarke (hereinafter referred to as "Clarke") is, and at all times herein relevant has been employed by the NDCS as the Warden of the Nebraska State Penitentiary (hereinafter referred to as the "NSP") since approximately 1 June 1987. In this capacity, defendant Clarke is the Chief Executive Officer of the NSP. He is responsible for the custody, control and correctional treatment of persons confined in the NSP and is also responsible for the general administration of that institution pursuant to Neb. Rev. Stat. §§83-108.02, 83-177, 83-178, 83-179, 83-181, 83-185, 83-4,109 to 83-4,123 (Reissue 1987), 29-2204, 29-2519 et seq. (Reissue 1985), the Rules and Regulations of the NDCS and the NSP, the Custody Classification Manual, and the Constitution of the United States. In addition, defendant Clarke has approved or denied the decisions of the Segregation Status Review Committees, the Unit Team Classification Committees, and the Nebraska State Penitentiary Classification Committee. Prior to defendant Clarke's appointment as Warden of the NSP, he was employed as the Deputy Warden of the NSP, and has served as a member of the Nebraska State Penitentiary Classification Committee which has reviewed and approved the decisions of the Segregation Status Review Committees and the Unit Team Classification Committees. Defendant Clarke is sued in his individual and official capacities.

5. Defendant Gary Grammer (hereinafter referred to as "Grammer") is, and at all times herein relevant has been employed by the NDCS as the Warden of the NSP from approximately 1 April

1985 to approximately 1 June 1987. In this capacity, defendant Grammer was the Chief Executive Officer of the NSP. He was responsible for the custody, control and correctional treatment of persons confined in the NSP, and was also responsible for the general administration of that institution pursuant to Neb. Rev. Stat. §§83-108.02, 83-177, 83-178, 83-179, 83-181, 83-185, 83-4,109 to 83-4,123 (Reissue 1987), 29-2204, 29-2519 et seq. (Reissue 1985), the Rules and Regulations of the NDCS and the NSP, the Custody Classification Manual, and the Constitution of the United States. In addition, defendant Grammer approved or denied the decisions of the Segregation Status Review Committees, the Unit Team Classification Committees, and the Nebraska State Penitentiary Classification Committee. Prior to defendant Grammer's appointment as the Warden of the NSP, he was employed as the Superintendent of the NDCS Diagnostic and Evaluation Unit. As the Superintendent of the NDCS Diagnostic and Evaluation Unit, defendant Grammer had the responsibility of having the appropriate Diagnostic and Evaluation Unit's Classification authority develop an initial Classification Study for each capital inmate committed to the NDCS and then approving or denying the decision and recommendations of said initial Classification Study. Defendant Grammer is presently employed as the Assistant Director of Adult Institutions within the NDCS. Defendant Grammer is sued in his individual and official capacities.

6. Defendant Francis X. Hopkins (hereinafter referred to as "Hopkins") is, and at all times herein relevant has been employed by the NDCS as the Deputy Warden of the NSP. In this capacity, defendant Hopkins has certain responsibilities, powers and duties

delegated to him pursuant to Neb. Rev. Stat. §§83-173 and 83-177 (Reissue 1987) with regard to the management and administration of the Custody Division of the NSP, including Death Row, and he is subject to the provisions of Neb. Rev. Stat. §§83-108.02, 83-178, 83-179, 83-4,109 to 83-4,123 (Reissue 1987), 29-2204, 29-2519 et seq. (Reissue 1985), the Rules and Regulations of the NDCS and the NSP, the Custody Classification Manual, and the Constitution of the United States. In addition, defendant Hopkins has served as a member of the Nebraska State Penitentiary Classification Committee which has reviewed and approved the decisions of the Segregation Status Review Committees and the Unit Team Classification Committees. Defendant Hopkins is sued in his individual and official capacities.

7. Defendant Mario Peart (hereinafter referred to as "Peart") is, and at all times herein relevant has been employed by the NDCS as the Housing Unit Administrator at the NSP. In this capacity, defendant Peart has certain responsibilities, powers and duties delegated to him pursuant to Neb. Rev. Stat. §§83-173 and 83-177 (Reissue 1987) with regard to the management and administration of the Housing Unit Division of the NSP, including Death Row, and he is subject to the provisions of Neb. Rev. Stat. §§83-108.02, 83-178, 83-179, 83-4,109 to 83-4,123 (Reissue 1987), 29-2204, 29-2412 et seq. (Reissue 1985), the Rules and Regulations of the NDCS and the NSP, the Custody Classification Manual, and the Constitution of the United States. In addition, defendant Peart has served as a member of the Nebraska State Penitentiary Classification Committee which has reviewed and approved the decisions of the Segregation Status Review Committees and the Unit Team Classification Commit-

tees. Defendant Peart is sued in his individual and official capacities.

8. Defendant John T. Eggers (hereinafter referred to as "Eggers") is, and at all times herein relevant has been employed by the NDCS as the Housing Unit Manager assigned to Housing Unit #4 of the NSP. In this capacity, defendant Eggers has certain responsibilities, powers and duties delegated to him pursuant to Neb. Rev. Stat. §§83-173 and 83-177 (Reissue 1987) with regard to the day-to-day operation, administration and security of Housing Unit #4, including Death Row, and he is subject to the provisions of Neb. Rev. Stat. §§83-108.02, 83-178, 83-179, 83-182, 83-4,109 to 83-4,123 (Reissue 1987), 29-2204, 29-2519 et seq. (Reissue 1985), the Rules and Regulations of the NDCS and the NSP, the Custody Classification Manual, and the Constitution of the United States. In addition, defendant Eggers is a member of the Housing Unit #4 Unit Team Classification Committee (hereinafter referred to as the "Unit Classification Committee") and the Housing Unit #4 Segregation Status Review Committee. Defendant Eggers is sued in his individual and official capacities.

9. Defendants Roger Pehrson (hereinafter referred to as "Pehrson"), Douglas Adams (hereinafter referred to as "Adams") and Robert Benson (hereinafter referred to as "Benson") are, and at all times herein relevant have been employed by the NDCS as the Housing Unit Supervisor II's assigned to Housing Unit #4 of the NSP. In this capacity, defendants Pehrson, Adams and Benson have certain responsibilities, powers and duties delegated to them pursuant to Neb. Rev. Stat. §§83-173 and 83-177 (Reissue 1987) with regard to

the day-to-day operation, administration and security of Housing Unit #4, including Death Row, and they are subject to the provisions of Neb. Rev. Stat. §§83-108.02, 83-178, 83-179, 83-181, 83-182, 83-4,109 to 83-4,123 (Reissue 1987), 29-2204, 29-2519 et seq. (Reissue 1985), the Rules and Regulations of the NDCS and the NSP, the Custody Classification Manual, and the Constitution of the United States. In addition, defendants Pehrson, Adams and Benson are members of the Unit Classification Committee and the Housing Unit #4 Segregation Status Review Committee. Defendants Pehrson, Adams and Benson are sued in each of their respective individual and official capacities.

10. Defendants Terry Kiene (hereinafter referred to as "Kiene"), Russell Schuster (hereinafter referred to as "Schuster"), Michael R. Ford (hereinafter referred to as "Ford") and Karl Eisback (hereinafter referred to as "Eisback") are, and at all times herein relevant have been employed as Housing Unit Supervisor I's assigned to Housing Unit #4 of the NSP. In this capacity, defendants Kiene, Schuster, Ford and Eisback have certain responsibilities, powers and duties delegated to them pursuant to Neb. Rev. Stat. §§83-108.02, 83-178, 83-179, 83-181, 83-182, 83-4,109 to 83-4,123 (Reissue 1987), 29-2204, 29-2519 et seq. (Reissue 1985), the Rules and Regulations of the NDCS and the NSP, the Custody Classification Manual, and the Constitution of the United States. In addition, defendants Kiene, Schuster, Ford and Eisback are members of the Unit Classification Committee and the Housing Unit #4 Segregation Status Review Committee. Defendants Kiene, Schuster, Ford and Eisback are sued in each of their respective individual and official

capacities.

11. Defendants Nebraska State Penitentiary Housing Unit #4 Correctional Officers/Corporals (hereinafter referred to as the "Correctional Officers/Corporals") are, and at all times herein relevant have been employed by the NDCS as Correctional Officers/Corporals assigned to Housing Unit #4 of the NSP, of which the Corporals are specifically assigned to Death Row. That these Correctional Officers/Corporals are assigned to Housing Unit #4 on a four (4) month rotation. In this capacity, defendants Correctional Officers/Corporals have certain responsibilities, powers and duties delegated to them pursuant to Neb. Rev. Stat. §§83-173 and 83-177 (Reissue 1987) with regard to the day-to-day operation, administration and security of Housing Unit #4, including Death Row, and they are subject to the provisions of Neb. Rev. Stat. §§83-108.02, 83-178, 83-179, 83-181, 83-182, 83-4,109 to 83-4,123 (Reissue 1987), 29-2204, 29-2519 et seq. (Reissue 1985), the Rules and Regulations of the NDCS and the NSP, the Custody Classification Manual, and the Constitution of the United States. In addition, defendants Correctional Officers/Corporals have served as alternate members of the Unit Classification Committee and have served as members of the Housing Unit #4 Segregation Status Review Committee. Defendants Correctional Officers/Corporals are sued in each of their respective individual and official capacities.

12. Defendant Nebraska State Penitentiary Classification Committee Members (hereinafter referred to as the "Institution Classification Committee") are, and at all times herein relevant have been employed by the NDCS assigned as members of the Institution

Classification Committee of the NSP. In this capacity, defendant Institution Classification Committee has certain responsibilities, powers and duties delegated to them pursuant to Neb. Rev. Stat. §§83-173, 83-108.02, 83-177, 83-178 and 83-179 (Reissue 1987) with regard to the management and administration of the classification or reclassification procedures at the NSP, and they are subject to the provisions of Neb. Rev. Stat. §§83-108.02, 83-178, 83-179, 83-182, 83-185, 83-4,109 to 83-4,123 (Reissue 1987), 29-2204, 29-2519 et seq. (Reissue 1985), the Rules and Regulations of the NDCS and the NSP, the Custody Classification Manual, and the Constitution of the United States. In addition to defendants Clarke, Hopkins, and Peart, there are other Institution Classification Committee members whose names are presently unknown to the plaintiff. Also, the defendant Institution Classification Committee approved or denied the decisions of the Housing Unit #4 Segregation Status Review Committees and Unit Classification Committees. Defendant Institution Classification Committee members are sued in each of their respective individual and official capacities.

13. Defendants Gunter, Clarke, Grammer, Hopkins, Peart, Eggers, Pehrson, Adams, Benson, Kiene, Schuster, Ford, Eisback, Correctional Officers/Corporals, and Institution Classification Committee members have acted under "color of state law, regulation, custom and/or usage" at all times relevant to this Complaint.

STATEMENT OF FACTS

14. The plaintiff is a prisoner confined at the NSP under a sentence of Death and three sentences of 16 2/3 years to 50 years and is under a stay of execution issued in connection with the

legal proceedings challenging his convictions and sentences.

15. On approximately 1 August 1975, a jury in the District Court of Douglas County, Nebraska, convicted plaintiff Rust of First Degree Murder in perpetration of or attempt to perpetrate a Robbery and of three (3) counts of Shooting with Intent to Kill, Wound or Maim.

16. On approximately 30 October 1975, in the District Court of Douglas County, Nebraska, a three-judge panel imposed the sentence of Death on plaintiff for First Degree Murder in perpetration of or attempt to perpetrate a Robbery, and the trial judge imposed three (3) sentences of 16 2/3 years to 50 years for each count of Shooting with Intent to Kill, Wound or Maim. In addition, each of the aforesaid four (4) sentences are to be served concurrently.

17. The three-judge panel did not order that plaintiff Rust be kept in solitary confinement for any period of time between the sentence of death and execution thereof.

18. The trial judge expressly ordered that no part of plaintiff Rust's three (3) Shooting with Intent to Kill, Wound or Maim sentences of 16 2/3 years to 50 years are by virtue of each sentence to be spent in solitary confinement.

19. On approximately 30 October 1975, plaintiff Rust was transported to the Nebraska State Penitentiary, where he has been confined since that date.

20. That prisoners sentenced to death were allowed to reside in the general population of the NSP from 1975 through 1978.

21. The administrative policy and practice was that whenever an execution date was fixed for a prisoner sentenced to the death

penalty, said prisoner would be removed from the general population and placed in Administrative Segregation. This policy and practice was promulgated in Rule 6(14)(a)(vii) of Chapter 4 of the Nebraska Department of Correctional Services Administrative Rules and Regulations which stated: "Adult offender sentenced to death penalty and date of execution fixed" (hereinafter referred to as "NDCS Rule 6(14)").

22. That upon receipt of an order which stayed the execution date of a prisoner sentenced to the death penalty, said prisoner would be released from Administrative Segregation and allowed to reside in the general population of the NSP.

23. On approximately 26 October 1977, the Nebraska Supreme Court set an execution date of 23 January 1978 for plaintiff Rust.

24. On approximately 27 October 1977, plaintiff Rust was informed that he was being removed from the general population of the NSP and confined in the NSP's Adjustment Center under Administrative Detention because the Nebraska Supreme Court had set an execution date and that plaintiff Rust would be returned to the general population when he had received a stay of his execution date.

25. On approximately 19 January 1978, plaintiff Rust's execution date was stayed from 23 January 1978 to 24 April 1978.

26. On approximately 17 April 1978, plaintiff Rust received an indefinite stay of execution.

27. That approximately May 1978, former Nebraska Department of Correctional Services Director Joseph Vitek sent a letter to Nebraska Civil Liberties Union Executive Director Barbara Gaither

stating that plaintiff Rust would be reviewed for placement in the general population of the NSP since plaintiff's date of execution was no longer fixed.

28. On approximately 8 June 1978, pursuant to NDCS Rule 6(14), former Deputy Warden Thomas K. Mason sent plaintiff Rust a detailed written explanation which stated that Mr. Mason had reviewed plaintiff's status and had determined that plaintiff would remain in administrative detention due to his still being under the sentence of Death.

29. On approximately 8 June 1978, pursuant to NDCS Rule 6(14), former Deputy Warden Thomas K. Mason sent a similar detailed written explanation to each of the other three (3) prisoners under the death penalty which informed them that they would be confined in administrative detention because they were under the sentence of Death.

30. On approximately 27 October 1978 or 27 November 1978, NDCS Rule 6(14) was revised to provide that an adult offender sentenced to the death penalty would be confined in Administrative Segregation/Detention.

31. In Ballew v Bolin, CV79-L-225 (D. Neb. Consent Order dated 4 June 1980) the United States District Court for the District of Nebraska entered a Consent Order in which the defendants acknowledged that NDCS Rule 6(14) fails to provide adequate due process safeguards to inmates subjected to the rule, and agree, as such, said rule is unconstitutional in that it subjects inmates to a loss of liberty interest without due process procedures in violation of the United States Constitution.

32. That all prisoners sentenced to the death penalty were either retained or placed on Administrative Segregation/Detention status pursuant to NDCS Rule 6(14) as promulgated under Ballew v Bolin, CV79-L-225 (D. Neb. Consent Order dated 4 June 1980).

33. On approximately 21 January 1981, the NSP Administration transferred all the prisoners sentenced to the death penalty from the Adjustment Center to F Gallery in the West Cell Block of the NSP.

34. On approximately 3 November 1981, the NSP Administration transferred all the prisoners sentenced to the death penalty from F Gallery in the West Cell Block to D Gallery in the new Housing Unit #4 at the NSP.

35. That confinement on Administrative Segregation/Detention status pursuant to NDCS Rule 6(14) did not involve solitary confinement until the promulgation of the new Death Row schedules described infra in paragraph 36.

36. On approximately 26 November 1984 and 5 December 1984, defendants Clarke, Peart and Eggers promulgated new Death Row schedules that resulted in the solitary confinement of all the inmates, including the plaintiff, sentenced to the death penalty.

37. Approximately September 1985, Chapter 4 of the Nebraska Department of Correctional Services Administrative Rules and Regulations were revised to repeal and replace NDCS Rule 6(14) with Rule 6(16) of Chapter 4 of the Nebraska Department of Correctional Services Administrative Rules and Regulations (hereinafter referred to as "NDCS Rule 6(16)").

38. That NDCS Rule 6(16) states: "Solitary Confinement. Sol-

itary Confinement is the status of confinement in an individual cell having solid, soundproof doors, and depriving the offender of all visual and auditory contact with other persons. No offender shall be placed in solitary confinement for disciplinary reasons. This provision does not apply to segregation or isolation of persons for purposes of institutional control."

39. That NDCS Rule 6(16) as duly adopted and enacted pursuant to Neb. Rev. Stat. §84-901, et seq. (Reissue 1987) has the full force and effect of law and is as binding as if it was a statute enacted by the legislature. Douglas County Welfare Administration v Parks, 204 Neb. 570, 284 N.W.2d 10 (1979); Smith v Sorensen, 748 F.2d 427, 431 (8th Cir. 1984).

40. The defendants assert that the Administrative Segregation, of all inmates sentenced to the death penalty, for the purpose of institutional control is authorized by Neb. Rev. Stat. §83-4,114 (Reissue 1987) and NDCS Rule 6(16).

41. That Neb. Rev. Stat. §83-4,114 (Reissue 1987) was enacted into law on approximately 10 July 1976 and that NDCS Rule 6(16) was enacted approximately September 1985 which was well after the plaintiff's four (4) criminal offenses were committed on 21 February 1975.

42. The defendants assert that pursuant to Neb. Rev. Stat. §83-4,114 (Reissue 1987) and NDCS Rule 6(16) all inmates under the death penalty have been placed in administrative segregation for the purpose of control and safety since the administrators of the NSP have determined that such inmates have a greater potential for suicide than the average inmate, and there is greater risk of

attempted escape. In addition, administrators have determined that such inmates constitute a threat to the good order, safety, and security of the institution.

43. That Neb. Rev. Stat. §83-4,114 (Reissue 1987), NDCS Rule 6(16), and the 26 November 1984 and 5 December 1984 Death Row schedules violate the Ex Post Facto Clause of the United States Constitution since they retrospectively impose the additional punishment of solitary confinement upon the plaintiff whose criminal offenses were committed on 21 February 1975.

44. That solitary confinement, under Nebraska law, is reserved for these specific instances: (a) pursuant to Neb. Rev. Stat. §29-2204 (Reissue 1985) in all cases when any person shall be convicted of any offense by this (criminal) code declared criminal, and made punishable by imprisonment in the Department of Correctional Services adult correctional facility the trial court shall declare whether any such convict shall be kept in solitary confinement in the cells of the Department of Correctional Services adult correctional facility, without labor, and if so, for what period of time. See, State v Stratton, 220 Neb. 854, 860, 374 N.W.2d 31, 35 (1985); (b) pursuant to Neb. Rev. Stat. §83-4,114 (Reissue 1987) solitary confinement is a disciplinary procedure for purposes of penal administration. Reed v Parratt, 207 Neb. 796, 798, 301 N.W.2d 343, 345 (1981) (Sections 83-4,109 to 83-4,123 constitute a special act relating to disciplinary procedures in adult correctional institutions). See also, Wolff v McDonnell, 418 U.S. 539, 571 n. 19, 94 S.Ct. 2963, 2982 n. 19 (1974).

45. The legislative history of Neb. Rev. Stat. §83-4,109 to

83-4,123 (Reissue 1987) establishes that the purpose of LB 275 is to establish due process standards for disciplinary proceedings administered by the Department of Correctional Services and to bring Nebraska into conformity with the United States Supreme Court ruling in Wolff v McDonnell, 418 U.S. 539, 94 S.Ct. 2963 (1974).

46. That Section 83-4,109 provides specifically: "Disciplinary procedures in adult institutions administered by the Department of Correctional Services shall be governed by the provisions of sections 83-4,109 to 83-4,123."

47. That under Neb. Rev. Stat. §§83-4,109 to 83-4,123 (Reissue 1987) and Wolff v McDonnell, 418 U.S. 539, 94 S.Ct. 2963 (1974) the plaintiff has a right to be placed in and/or to remain in the general population of the NSP.

48. That under Neb. Rev. Stat. §§83-4,109 to 83-4,123 (Reissue 1987) and Wolff v McDonnell, 418 U.S. 539, 94 S.Ct. 2963 (1974) the plaintiff's transfer to or placement in solitary confinement can be triggered only by certain events: violation of certain rules and the creation of a danger to the security of the institution, and that plaintiff may be sent to both disciplinary isolation and/or administrative segregation only after being given a due process hearing to determine if these specified events have occurred.

49. That the defendants have been and are using solitary confinement for both disciplinary isolation and administrative segregation at the NSP.

50. That pursuant to Neb. Rev. Stat. §§83-108.02, 83-178 and 83-179 (Reissue 1987), Administrative Regulation 201.1 "Adult Inmate Classification and Assignment - Administrative Organization"

(hereinafter all "Administrative Regulations" will be referred to as "AR"), AR 201.2 "Adult Inmate Classification and Assignment - Initial Classification, Reception and Orientation, the Custody Classification Manual, and Operational Memorandum 201.002.101 "Reception of Capital Inmates" (hereinafter all "Operational Memorandum" will be referred to as "OM"), the plaintiff is affirmatively guaranteed certain rights to classification and assignment. That under AR 201.1, AR 201.2, and the Custody Classification Manual the NSP officials have promulgated written policies and procedures to implement such rights.

51. That pursuant to AR 201.1, AR 201.2, and the Custody Classification Manual, defendants Clarke and Grammer have promulgated and revised OM 201.001.101 "Unit Classification", OM 201.002.101 "Reception of Capital Inmates", OM 201.002.102 "Initial Classification", and OM 201.003.102 "Inmate Orientation Program".

52. That the Custody Classification Manual provides: "Written policy and procedure shall provide for special confinement of inmates sentenced to the death penalty."

53. That OM 201.002.101 "Reception of Capital Inmates" (hereinafter referred to as "OM 201.002.101") provides that all inmates sentenced to the death penalty are to be classified and assigned by the preparation of a Classification Study that will be completed in accordance with LCC guidelines. A true and correct copy of OM 201.002.101 as effective 22 June 1987, is attached hereto as Exhibit 1 and incorporated herein by this reference.

54. That plaintiff Rust has never had a Classification Study developed under the LCC or NSP guidelines.

55. On approximately 19 March 1986, the Unit Classification Committee informed plaintiff Rust of his placement on the NDCS Classification System via the Reclassification Action Form.

56. That on approximately 18 February 1987 and 17 February 1988, plaintiff Rust appeared before the Unit Classification Committee for his required annual classification review and was again reclassified to Administrative Confinement status at each of these annual classification reviews.

57. That the NDCS Classification System provides for the classification and assignment of an inmate to the following six (6) types of condition status: General Population, Administrative Confinement, Intensive Management, Protective Custody, Special Programs Needs, and Other _____.

58. That the NDCS Classification System designates three (3) types of Administrative Segregation: Administrative Confinement, Intensive Management, and Protective Custody.

59. The Custody Classification Manual sets forth, in mandatory language, the following procedures which shall be complied with when classifying and assigning any inmate to Administrative Segregation: (a) written notice of reasons for placement in segregated confinement, (b) impartial hearing before appropriate classification committee within ten (10) working days following the review for immediate segregation and said inmate shall receive a minimum of forty-eight (48) hours written notice of this hearing, (c) hearing before institutional classification committee for periods of up to but not exceeding ninety (90) days; inmates may be referred to the Director's Sub-Committee for consideration for administrative

confinement or protective custody in excess of ninety (90) days, (d) provided with a written decision after the hearing.

60. That the Unit Classification Committee's classification and assignment of plaintiff Rust to Administrative Confinement on approximately 19 March 1986, 18 February 1987 and 17 February 1988 has resulted in plaintiff being classified and assigned to solitary confinement. In addition, the Institution Classification Committee, defendants Grammer, Clarke and Gunter have approved the Unit Classification Committee's classification and assignment of plaintiff to Administrative Confinement/solitary confinement.

61. That pursuant to Neb. Rev. Stat. §§83-4,109 to 83-4,123 (Reissue 1987); Wolff v McDonnell, 418 U.S. 539, 94 S.Ct. 2963 (1974); and the Custody Classification Manual the plaintiff has a right to receive the mandatory due process procedures that are required to be complied with when classifying and assigning any inmate to segregation or isolation that results in solitary confinement.

62. That both non-capital inmates and capital inmates are classified and assigned to Administrative Confinement status.

63. That the non-capital inmates, who are classified and assigned to Administrative Confinement status, are afforded the mandatory due process procedures described in paragraph 59, supra.

64. That the capital inmates, who are classified and assigned to Administrative Confinement status, are not afforded the mandatory due process requirements described in paragraph 59, supra.

65. That plaintiff Rust has never been afforded any of the mandatory due process requirements set forth in Neb. Rev. Stat.

883-4,109 to 83-4,123 (Reissue 1987); Wolff v McDonnell, *supra*; and the Custody Classification Manual when he was classified and assigned to Administrative Confinement status which resulted in solitary confinement.

66. That plaintiff Rust's sentence structure, which involves a death sentence, is/was the sole determinant for his classification and assignment to Administrative Confinement status.

67. That administrative segregation may not be used as a pretext for indefinite confinement of an inmate. Hewitt v Helms, 459 U.S. 460, 477 n. 9, 103 S.Ct. 864, 874 n. 9 (1983). See also, Heathman v Benson, CV81-L-227, slip op. at 6 (D. Neb. Memorandum date 9 August 1983)(I cannot approve a situation in which the committee could keep a prisoner in solitary confinement for a great length of time for any reason or for no reason at all).

68. That some type of reasonable, periodic review of an inmate's confinement in administrative segregation is constitutionally required. Hewitt v Helms, 459 U.S. 460, 477 n. 9, 103 S.Ct. 864, 874 n. 9 (1983); Clark v Brewer, 776 F.2d 226, 235 (8th Cir. 1985). See also, Smith v Coughlin, 748 F.2d 783, 787 (2d Cir. 1984)(lengthy segregated confinement of the type (death row) considered herein, after an inordinate lapse of time, may necessitate periodic review to insure that conditions once constitutional have not become cruel and unusual).

69. That pursuant to Heathman v Benson, CV81-L-227 (D. Neb. Memorandum of Decision dated 9 August 1983 and Judgment dated 4 October 1983) the NDCS and the NSP established an institutional review schedule and designated that the Segregation Status Review

Committee(s) shall review the status of all inmates assigned to segregated confinement status. The Segregation Status Review Committees' review schedule is set forth in the Custody Classification Manual.

70. That pursuant to Heathman v Benson, *supra*, the NDCS and the NSP adopted and promulgated a basic set of guidelines for the determination of an inmate's removal from segregated confinement status. The aforesaid guidelines are set forth in the Custody Classification Manual.

71. That OM 201.002.101 does not require the permanent retention of any capital inmate, including plaintiff Rust, in Administrative Segregation between the sentence of death and the execution thereof.

72. That OM 201.002.101 specifically requires: "The Team Classification Committee for Housing Unit #4 will review the status of each inmate housed on Death Row in accordance with the established institutional review schedule." The established institutional review schedule has been established pursuant to Heathman v Benson, *supra*.

73. That the Housing Unit #4 Segregation Status Review Committee holds a review hearing once a month which inmates sentenced to the death penalty can attend. The decisions of this monthly segregation status review are approved or denied by the defendants, Institution Classification Committee, Grammer, and Clarke.

74. That each inmate who appears before the Housing Unit #4 Segregation Status Review Committee receive a carbon copy of the Segregation Status Review Sheet completed for that month's review

hearing. A true and correct copy of one of plaintiff Rust's monthly Segregation Status Review Sheets is attached hereto as Exhibit 2 and incorporated herein by this reference.

75. Plaintiff Rust has requested, on several occasions, that the Housing Unit #4 Segregation Status Review Committee conduct a meaningful review of his segregated confinement status to consider either of the following: placement in the general population and/or to be given greater privileges while he is confined under Administrative Segregation.

76. That the Housing Unit #4 Segregation Status Review Committee refuses to conduct any type of meaningful review of plaintiff Rust's segregated confinement status to consider plaintiff for possible placement in the general population and/or for the possibility of being given greater privileges while he is confined under Administrative Segregation because the plaintiff's sentence structure contains the death penalty.

77. That the United States Court of Appeals for the Eighth Circuit in Kelly v Brewer, 525 F.2d 394 (1975) held that a criminal conviction cannot constitutionally be used to keep a convicted inmate indefinitely confined in administrative segregation.

78. That defendants Eggers, Pehrson, Adams, Benson, Kiene, Schuster, Ford, Eisback, and Correctional Officers/Corporals have consistently refused to comply with the mandates of Hewitt v Helms, supra; Clark v Brewer, supra; Kelly v Brewer, supra; Heathman v Benson, supra; the Custody Classification Manual; and OM 201.002. 101 when they refuse to hold and conduct any type of meaningful review of plaintiff Rust's segregated confinement status at the

hearings held by the Housing Unit #4 Segregation Status Review Committees.

79. That the term "Death Row" is utilized within the NDCS and the NSP to denote those inmates sentenced to the death penalty, or the Administrative Confinement status of those inmates sentenced to the death penalty, or for "D" Gallery in Housing Unit #4 at the NSP.

80. The reasons that are asserted by the defendants for the NDCS and the NSP policy of classification and assignment of all inmates, under the death penalty, to Administrative Segregation for purposes of institutional control are that the defendants have determined that such inmates have a greater potential for suicide than the average inmate, and there is greater risk for attempted escape. In addition, defendants have determined that such inmates constitute a threat to the good order, safety, and security of the institution.

81. That the defendants' determinations, as set forth in paragraph 80, constitute "conclusive" or "irrebuttable" presumptions.

82. That these "conclusive" or "irrebuttable" presumptions make a death sentence the sole determinant for the administrative segregation and/or solitary confinement of an inmate sentenced to the death penalty.

83. That these "conclusive" or "irrebuttable" presumptions may have some intuitive appeal, but no basis in fact when such generalized presumptions are used in determining to confine and/or to retain plaintiff Rust in Administrative Segregation and/or solitary confinement.

84. That plaintiff Rust's death sentence and/or sentence structure was/is the sole determinant for his classification and assignment to solitary confinement under the segregated status of Administrative Confinement.

85. That the defendants refuse to provide the inmates, under the death penalty, the same opportunity to be classified and assigned to the general population, just as any other non-capital inmate is classified and assigned to the general population.

86. That there are general population inmates within the NDCS who have a track record of violence, escape, attempted escape, or attempted suicide. That these inmates are not in administrative segregation, while inmates under the death penalty, with no demonstrated record of problems, are classified and assigned to administrative segregation based solely on their death sentences which are based on "conclusive" or "irrebuttable" presumptions.

87. That the defendants cannot constitutionally classify and assign an inmate, sentenced to the death penalty, to some sort of administrative segregation/solitary confinement without any clearly identifiable and articulable reason(s) relating to that particular inmate.

88. That plaintiff Rust had accumulated sufficient custody rating points to have his custody grade considered for reclassification to medium custody.

89. That on approximately 17 February 1988, the Unit Classification Committee recommended an override to retain maximum custody, as plaintiff Rust is on Death Row. That the defendants Institution Classification Committee and Clarke approved this

recommendation, and that the Director's Review Committee overrode plaintiff Rust's medium custody rating to retain maximum custody, as plaintiff was/is on Death Row.

90. That on approximately 20 June 1988, plaintiff Rust submitted a Step One Grievance to the Chief Executive Officer of the NSP, and on approximately 28 June 1988, defendant Hopkins responded for the Chief Executive Officer. A true and correct copy of the Step One Grievance is attached hereto as Exhibit 3 and incorporated herein by this reference.

91. That on approximately 1 July 1988, plaintiff Rust submitted a Step Two Grievance appealing the results of the Step One Grievance, and on approximately 7 July 1988, defendant Grammer acting for defendant Gunter responded. A true and correct copy of the Step Two Grievance is attached hereto as Exhibit 4 and incorporated herein by this reference.

92. That defendants Eggers, Pehrson, Adams, Benson, Kiene, Schuster, Ford, Eisback, and Correctional Officers/Corporals do not receive any special training to work on Death Row and/or with the inmates under the death penalty.

LEGAL CLAIMS

93. Plaintiff Rust complains that the facts heretofore related disclose a systematic and concerted effort by the defendants and their agents to deprive plaintiff of the rights, privileges and immunities secured to the plaintiff by the Constitution of the United States, or the laws of Nebraska, including, but not limited to those enumerated in the succeeding paragraphs.

FIRST CAUSE OF ACTION

94. Plaintiff incorporates by reference the allegations contained in paragraphs 1 through 14 inclusive, 15 through 93 of this Complaint.

95. In order for a law to be ex post facto, it must be retrospective, applying to events occurring before its enactment, and must disadvantage the offender affected by it.

96. A new administrative interpretation which subjects a prisoner already sentenced to more severe punishment has the same effect as a new statute lengthening his present term or a new court decision making what was lawful when done a crime, and is prohibited by the Ex Post Facto Clause.

97. A statute or regulation violates the ex post facto clause when it alters the punitive conditions outside the sentence.

98. It is the effect, not the form, of the law that determines whether it is ex post facto.

99. Prison regulations adopted pursuant to a legislative directive are subject to the same ex post facto scrutiny as direct legislative enactments.

100. For ex post facto purposes, whether a retrospective state statute or regulation ameliorates or worsens conditions imposed by its predecessor is a federal question and the inquiry looks to the challenged provision and not to any special circumstances which might mitigate its effect on the particular individual.

101. That Neb. Rev. Stat. §83-4,114 (Reissue 1987), NDCS Rule 6(16), or the 26 November 1984 and 5 December 1984 Death Row schedules were enacted after plaintiff Rust's criminal offenses were

committed on 21 February 1975.

102. That under Nebraska law, Neb. Rev. Stat. §83-4,109 to 83-4,123 (Reissue 1987) and Wolff v McDonnell, 418 U.S. 539, 571 n. 19 (1974), solitary confinement constitutes a disciplinary procedure which can be triggered only by certain events: violation of certain rules and the creation of a danger to the good order, safety, and security of the institution.

103. The defendants have utilized Neb. Rev. Stat. §83-4,114 (Reissue 1981), NDCS Rule 6(16), or the 26 November 1984 and the 5 December 1984 Death Row schedules to retrospectively impose the more onerous additional punishment of solitary confinement on plaintiff Rust whose criminal offenses were committed prior to their enactment/promulgation.

104. The defendants have utilized §83-4,114, NDCS Rule 6(16), or the 26 November 1984 and the 5 December 1984 Death Row schedules to usurp the trial court's jurisdiction, under Neb. Rev. Stat. §29-2204 (Reissue 1985), to impose solitary confinement on plaintiff Rust.

105. The aforesaid actions of the defendants under color of state law deprived plaintiff Rust of rights, privileges and immunities secured by the Ex Post Facto Clause of Article I, Section 10 of the United States Constitution, for which plaintiff is entitled to seek redress pursuant to 42 U.S.C. §1983.

106. As a proximate result of defendants' unlawful acts as alleged herein, plaintiff Rust has suffered and continues to suffer physical and mental pain and suffering for which he is entitled to recover compensatory damages. Defendants' conduct as alleged

herein demonstrates evil intent or reckless and callous indifference to plaintiff's federally-protected rights, and plaintiff is therefore entitled to recover punitive damages.

SECOND CAUSE OF ACTION

107. Plaintiff Rust incorporates by reference the allegations contained in paragraphs 1 through 14 inclusive, 36 through 67, and 79 through 93 of the Complaint.

108. That under Nebraska law, Neb. Rev. Stat. §§83-4,109 to 83-4,123 (Reissue 1987) and Wolff v McDonnell, 418 U.S. 539, 571 n. 19 (1974), solitary confinement constitutes a disciplinary procedure.

109. The Nebraska statutes, NDCS Administrative Regulations, NSP Operational Memorandums, OM 201.002.101, and the Custody Classification Manual create a liberty interest that plaintiff Rust will be classified and assigned just as any other non-capital inmate is to be classified.

110. That Neb. Rev. Stat. §§83-4,109 to 83-4,123 (Reissue 1987) and Wolff v McDonnell, 418 U.S. 539 (1974) create a liberty interest that plaintiff Rust is entitled to be confined in the general population and that his transfer to or placement in Administrative Segregation/solitary confinement can be triggered only by certain events: violation of certain rules and/or the creation of a danger to the good order, safety, and security of the institution, and only after being afforded due process procedures to determine whether these specified events have occurred.

111. The defendants have arbitrarily, capriciously and summarily refused to provide plaintiff Rust with the full panoply of due

process procedures when he was classified and assigned to the segregated confinement status of Administrative Segregation/solitary confinement.

112. The defendants' official practice and policy is to confine all the inmates under Administrative Segregation status in solitary confinement, pursuant to Neb. Rev. Stat. §§83-4,114 (Reissue 1987) and NDCS Rule 6(16), for purposes of institutional control.

113. The defendants arbitrarily, capriciously and summarily created and apply "conclusive" or "irrebuttable" presumptions to make a death sentence the sole determinant for the administrative segregation/solitary confinement of all inmates under the death penalty.

114. The defendants classify and assign all inmates, sentenced to the death penalty, to Administrative Segregation/solitary confinement without ascertaining any clearly identifiable and articulable facts relating to a particular inmate.

115. The defendants utilized plaintiff Rust's death sentence and/or sentence structure as the sole determinant to classify and assign him to the segregated confinement status of Administrative Segregation/solitary confinement.

116. The defendants subject plaintiff Rust, and other inmates under the death penalty, to a less stringent standard of classification and assignment than is generally applicable to all other non-capital inmates who are convicted and sentenced under the Nebraska Criminal Code.

117. The defendants subject plaintiff Rust, and other inmates under the death penalty, to a less stringent standard for classifica-

tion and assignment to administrative segregation/solitary confinement than is applicable to all other non-capital inmates who are classified and assigned to administrative segregation/solitary confinement.

118. The defendants refuse to confine plaintiff Rust in the general population or in conditions that closely approximate those of the general population solely because plaintiff is under the death sentence.

119. The aforesaid actions of the defendants under color of state law deprived plaintiff Rust of rights, privileges and immunities secured by the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, for which plaintiff is entitled to seek redress pursuant to 42 U.S.C. §1983.

120. As a proximate result of defendants' unlawful acts alleged herein, plaintiff Rust has suffered and continues to suffer physical and mental pain and suffering from which he is entitled to recover compensatory damages. Defendants' conduct as alleged herein demonstrates evil intent or reckless and callous indifference to plaintiff's federally-protected rights, and plaintiff is therefore entitled to recover punitive damages.

THIRD CAUSE OF ACTION

121. Plaintiff Rust incorporates by reference the allegations contained in paragraphs 1 through 14 inclusive, 15 through 93 of this Complaint.

122. The defendants arbitrarily, capriciously and summarily create and apply "conclusive" or "irrebuttable" presumptions to

make a death sentence the sole determinant for the administrative segregation/solitary confinement of all inmates under the death penalty.

123. The defendants classify and assign all inmates, sentenced to the death penalty, to administrative segregation/solitary confinement without ascertaining any clearly identifiable and articulable facts relating to a particular inmate.

124. The defendants utilized plaintiff Rust's death sentence and/or sentence structure as the sole determinant to classify and assign him to the segregated confinement status of Administrative Segregation/solitary confinement.

125. The defendants refuse to confine plaintiff Rust, or any inmate sentenced to the death penalty, in the general population or in conditions that closely approximate those of the general population solely because they are under the death penalty.

126. The defendants arbitrarily, capriciously and summarily refuse to provide plaintiff Rust with the full panoply of due process procedures when he was classified and assigned to the segregated confinement status of Administrative Segregation/solitary confinement.

127. That under Nebraska law, Neb. Rev. Stat. §§83-4,109 to 83-4,123 (Reissue 1987) and Wolff v McDonnell, 418 U.S. 539, 571 n. 19 (1974), solitary confinement constitutes a disciplinary procedure which can be triggered only by certain events: violation of certain rules and the creation of a danger to the good order, safety, and security of the institution.

128. The defendants subject plaintiff Rust, and other inmates

under the death penalty, to a less stringent standard of classification and assignment to administrative segregation/solitary confinement than is applicable to all other non-capital inmates who are classified and assigned to administrative segregation/solitary confinement.

129. The defendants' Administrative Segregation/solitary confinement of plaintiff Rust is punishment without penological justification.

130. Plaintiff Rust constitutionally be confined in Administrative Segregation/solitary confinement without a reason.

131. The aforesaid actions of the defendants under color of state law deprived plaintiff Rust of rights, privileges and immunities secured by the Eighth Amendment to the United States Constitution, as that Amendment is made applicable to the states by the Fourteenth Amendment thereto, for which plaintiff is entitled to seek redress pursuant to 42 U.S.C. §1983.

132. As a proximate result of defendants' unlawful acts as alleged herein, plaintiff Rust has suffered and continues to suffer physical and mental pain and suffering for which he is entitled to recover compensatory damages. Defendants' conduct as alleged herein demonstrates evil intent or reckless and callous indifference to plaintiff's federally-protected rights, and plaintiff is therefore entitled to recover punitive damages.

FOURTH CAUSE OF ACTION

133. Plaintiff Rust incorporates by reference the allegations contained in paragraphs 1 through 14 inclusive, and 66 through 84 of this Complaint.

134. Defendants Eggers, Pehrson, Adams, Benson, Schuster, Ford, Kiene, Eisback, and Correctional Officers/Corporals arbitrarily, capriciously and summarily refuse to comply with or follow the mandates of Hewitt v Helms, 459 U.S. 460, 477 n. 9 (1983); Clark v Brewer, 776 F.2d 226, 235 (8th Cir. 1985); Kelly v Brewer, 525 F.2d 394 (8th Cir. 1974); Heathman v Benson, CV81-L-227 (D. Neb. Memorandum of Decision dated 9 August 1983 and Judgment dated 4 October 1983); OM 201.002.101 or the Custody Classification Manual in that they refuse to hold and conduct any type of meaningful review of plaintiff Rust's segregated confinement status of Administrative Segregation/solitary confinement to determine the possibility of plaintiff's placement in the general population and/or to be given greater privileges while plaintiff is confined in Administrative Segregation/solitary confinement.

135. Defendants subject plaintiff Rust to a more stringent standard of segregated confinement status review than those generally applicable to all other non-capital inmates in the segregated confinement status of Administrative Segregation/solitary confinement.

136. The Housing Unit #4 Segregation Status Review Committee refuses to hold or conduct any type of meaningful review of plaintiff Rust's segregated confinement status because he is on Death Row and because of his sentence structure.

137. The aforesaid actions of the defendants under color of state law deprived plaintiff Rust of rights, privileges and immunities secured by the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, for

which plaintiff is entitled to seek redress pursuant to 42 U.S.C. §1983.

138. As a proximate result of defendants' unlawful acts as alleged herein, plaintiff Rust has suffered and continues to suffer physical and mental pain and suffering from which he is entitled to recover compensatory damages. Defendants' conduct as alleged herein demonstrates evil intent or reckless and callous indifference to plaintiff's federally-protected rights, and plaintiff is therefore entitled to recover punitive damages.

EQUITY

139. Plaintiff Rust has no plain or adequate or complete remedy at law to redress the wrongs described herein. Plaintiff has been and will continue to be irreparably injured by the conduct of the defendants unless this Court grants the declaratory and injunctive relief which plaintiff seeks.

RELIEF

WHEREFORE, plaintiff John E. Rust prays for and requests this Court to grant the following relief:

1. That this Court enter a Declaratory Judgment to adjudge and declare that defendants, and each of them, through their individual and collective policies, practices, acts and omissions complained of herein, have subjected and are subjecting plaintiff to:

(a) denial of the rights, privileges and immunities in contravention of 42 U.S.C. §1983 and the Ex Post Facto Clause of Article I, Section 10 of the United States Constitution as enumerated in the plaintiff's First Cause of Action;

(b) denial of the liberty interest created pursuant to Neb. Rev. Stat. §§83-4,109 to 83-4,123 (Reissue 1987) and Wolff v McDonnell, 418 U.S. 539, 94 S.Ct. 2963 (1974) to be placed in and/or to remain in the general population of the NSP;

(c) the transfer to and/or placement in Administrative Segregation/solitary confinement without the occurrence of certain events: violation of certain rules and/or the creation of a danger to the good order, safety, and security of the institution;

(d) the disciplinary procedure of solitary confinement without being afforded any type of minimum due process procedures to determine whether plaintiff was responsible for the occurrence of these events;

(e) the arbitrary, capricious and summary creation and application of "conclusive" or "irrebuttable" presumptions to make a death sentence the sole determinant for the administrative segregation/solitary confinement of all inmates under the death penalty;

(f) the classification and assignment to Administrative Segregation/solitary confinement without ascertaining any clearly identifiable and articulable facts relating to plaintiff Rust;

(g) the arbitrary, capricious and summary use of plaintiff's death sentence and/or sentence structure as the sole determinant to classify and assign him to the segregated confinement status of Administrative Segregation/solitary confinement;

(h) less stringent standards for classification and assignment to Administrative Segregation/solitary confinement than is generally applicable to all other non-capital inmates who are

classified and assigned to Administrative Segregation/solitary confinement;

(i) less stringent standard for classification and assignment of plaintiff, due to his sentence structure and/or death sentence, than is generally applicable to all other non-capital inmates who are convicted and sentenced under the Nebraska Criminal Code;

(j) the denial of due process of law and of equal protection of law in contravention of 42 U.S.C. §1983 and the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution as enumerated in plaintiff's Second Cause of Action;

(k) punishment without penological justification in contravention of 42 U.S.C. §1983 and the Eighth Amendment to the United States Constitution, as that Amendment is made applicable to the states by the Fourteenth Amendment thereto, as enumerated in plaintiff's Third Cause of Action;

(l) a more stringent standard of review for release and/or for greater privileges than generally applicable to all other inmates in segregated confinement status, and the denial of any type of meaningful review of plaintiff's segregated confinement status for release and/or for greater privileges in contravention of 42 U.S.C. §1983 and the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution as enumerated in plaintiff's Fourth Cause of Action.

2. That the Court issue a preliminary and permanent injunction which prohibits and orders defendants, and each of them, in their personal and official capacities, their successors in office,

their agents and employees and all other persons in active concert and participation with them from engaging and continuing the policies, practices, acts and omissions as herein set forth, including, among such other relief as may be just, expressly enjoin defendants and each of them from:

(a) the imposition of the retrospective and more onerous additional punishment of solitary confinement of plaintiff Rust, whose capital offenses were committed prior to the enactment/promulgation of Neb. Rev. Stat. §83-4,114 (Reissue 1987), NDCS Rule 6(16), and the 26 November 1984 and the 5 December 1984 Death Row schedules;

(b) using the disciplinary procedure of solitary confinement to confine inmates, including plaintiff Rust, sentenced to the death penalty;

(c) the arbitrary, capricious and summary creation and application of "conclusive" or "irrebuttable" presumptions to make a death sentence the sole determinant for the administrative segregation/solitary confinement of all inmates under the death penalty;

(d) the classification and assignment of plaintiff Rust to the segregated confinement status of Administrative Segregation/solitary confinement without ascertaining clearly identifiable and articulable facts relating to plaintiff;

(e) the arbitrary, capricious and summary use of plaintiff Rust's sentence structure and/or death sentence as the sole determinant to classify and assign plaintiff to the segregated confinement status of Administrative Segregation/solitary confinement;

(f) deprivation of the liberty interest created pursuant to

Neb. Rev. Stat. §§83-4,109 to 83-4,123 (Reissue 1987) and Wolff v McDonnell, 418 U.S. 539, 94 S.Ct. 2963 (1974) that plaintiff Rust be placed in and/or remain in the general population of the NSP, since plaintiff's transfer to or placement in solitary confinement can be triggered only by certain events: violation of certain rules and/or the creation of a danger to the good order, safety, and security of the institution;

(g) using the less stringent standards for classification and assignment to Administrative Segregation/solitary confinement than is generally applicable to all other non-capital inmates who are classified and assigned to Administrative Segregation/solitary confinement;

(h) using the less stringent standard for classification and assignment of plaintiff, due to his sentence structure and/or death sentence, than is generally applicable to all other non-capital inmates who are convicted and sentenced under the Nebraska Criminal Code;

(i) using the more stringent standard of review for release and/or for greater privileges for plaintiff than the standard of review generally applicable to all other inmates in segregated confinement status;

(j) refusing to hold and/or conduct any type of meaningful review of plaintiff's segregated confinement status for release and/or for greater privileges;

(k) the administrative segregation and/or solitary confinement of plaintiff Rust based upon "conclusive" or "irrebuttable" presumptions, sentence structure, or death sentence is punishment

without penological justification;

(1) refusing to provide plaintiff Rust with the full panoply of due process procedures when he is classified and assigned to the segregated confinement status of Administrative Segregation and/or solitary confinement pursuant to Neb. Rev. Stat. §§83-4,109 to 83-4,123 (Reissue 1987), Wolff v McDonnell, 418 U.S. 539, 571 n. 19 (1974), OM 201.002.101, and the Custody Classification Manual;

(m) depriving plaintiff Rust of the liberty interest that he will be classified and assigned just as any other non-capital inmate is to be classified and assigned.

3. As alternative relief, to mandate and compel and enjoin defendants, and each of them, in their personal and official capacities, their successors in office, agents and employees, and all other persons in active concert and participation with them from engaging and continuing the policies, practices, acts and omissions as herein set forth, including, among such other relief as may be just, expressly enjoin defendants and each of them from:

(a) denying plaintiff Rust, and all other inmates under the death penalty, with full access and use of both the Death Row yard and Dayroom for time periods that closely approximate those of the general population of the NSP;

(b) failing to provide Housing Unit #4 Staff and Correctional Officers/Corporals with the necessary specialized training to properly insure effective and meaningful administration of the inmates under the death penalty and the Death Row Unit itself.

4. Require each of the defendants to pay nominal and compensatory damages in the amount of \$10,000.00 to the plaintiff.

5. Require each of the defendants to pay punitive damages in the amount of \$25,000.00 to the plaintiff.

6. That the Court grant plaintiff leave to proceed in forma pauperis pursuant to 28 U.S.C. §1915 (d) upon plaintiff's Declaration In Support of Request to Proceed In Forma Pauperis, attached hereto and incorporated herein by this reference.

7. Appoint an attorney for the plaintiff.

8. Award to plaintiff costs and expenses incurred in this action and reasonable attorney's fees as against defendants in either their official capacity, their personal capacity, or both.

9. That the Court retain jurisdiction in this Action and over the defendants and their successors in office, in their personal and official capacities, until this Court is satisfied that the unlawful policies, practices, acts and omissions, as alleged herein, no longer exist and will not reoccur.

10. For such other and further relief as this Court finds just and equitable in these circumstances.

Respectfully submitted,

John E. Rust
John E. Rust

P.O. Box 2500
Lincoln, Nebraska 68502-0500

VERIFICATION

I, John E. Rust, being first duly sworn according to law, deposes and says that this plaintiff resides at the Nebraska State Penitentiary, P.O. Box 2500, Lincoln, Nebraska 68502-0500; that I

am the plaintiff in the foregoing complaint and know the content thereof and that same is true and correct to the best of my knowledge, except as to the matters therein alleged on information and belief, and as to those matters I believe to be true.

John E. Rust
John E. Rust

SUBSCRIBED AND SWORN to before me on this 23rd day of November 1988.

Terence B. Campbell
NOTARY PUBLIC

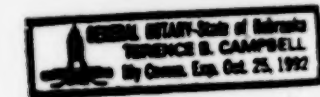


Exhibit 1 *Legal Aid Office*

Number: 201.002.101	Page Number: 1 of 2	OPERATIONAL MEMORANDUM Department of Correctional Services (Institution) <u>Nebraska State Penitentiary</u>
Subject: Reception of Capital Inmates		
Date: June 22, 1987		

DCS-A-151 (8-79)

- I. Purpose. To promulgate procedures for receiving and housing capital inmates.
- II. Policy. Under existing statutes and Agency guidelines, all male capital inmates will be housed at the Nebraska State Penitentiary during the period of their confinement as capital inmates. Special admission procedures described herein are applicable to this category of inmate.
- III. Applicability. This Memorandum is applicable to all divisions/departments/offices and will be kept current by the Office of the Deputy Warden.
- IV. General.
 - A. Individual(s) who have been given the death sentence will be delivered to the Lincoln Correctional Center's Evaluation Unit for initial processing. This processing activity will consist of taking fingerprints and identification photographs, assigning registration numbers, and including the inmate's name on a Transfer Order to the Penitentiary.
 - B. LCC Evaluation Unit staff will contact the Deputy Warden to request a maximum security escort to pick up the capital inmate(s) and transport him to the Penitentiary where he will be taken directly to Housing Unit #4. The inmate's personal property will be hand-delivered separately to the Property Control area for in-processing.
 - C. The Unit Administrator, Security Administrator, (or designees) will sign the Transfer Order which acknowledges that the named inmate has been received.
- V. Procedures.
 - A. Capital inmates automatically will be placed on Administrative Detention status and housed on "D" Wing in Housing Unit #4. If the inmate has a serious medical problem (e.g., contagious disease, etc.) the Warden will order that he be housed in the Penitentiary Hospital or in some other suitable location.
 - B. Upon arrival the inmate shall be given a written explanation of the reasons for his assignment to Death Row - a copy of which also will be placed in his record file.
 - C. Even though capital inmates will be bypassing the normal routine LCC phase of the reception and orientation process, LCC retains responsibility for developing a Classification Study for each capital inmate committed to the Department. This Classification Study will be completed in accordance with LCC guidelines.
 - D. The Team Classification Committee for Housing Unit #4 will review the status of each inmate housed on Death Row in accordance with the established institutional review schedule.

Number: 201.002.101	Page Number: 2 of 2	OPERATIONAL MEMORANDUM Department of Correctional Services (Institution) <u>Nebraska State Penitentiary</u>
Subject: Reception of Capital Inmates		
Date: June 22, 1987		

DCS-A-151 (8-79)

VI. References. AR 201.2; ACA Standard 2-4389.

Harold W. Clarke
Harold W. Clarke
Warden

Revision History.

Effective: December 1, 1983
Revised: June 22, 1987

Summary of Revision

To restate the contents of sections IV and V. Also, to reassign maintenance responsibility to the Deputy Warden.

NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES
Segregation Status Review Sheet Exhibit 2

Inmate name: W. J. Rust # 0012 Location: 4L12
Unit Supervisor II: 117

Segregation Type: Disciplinary: ☒ Administrative: ☐
Reason for Segregation: Death Row
Authority for Segregation: Warden
Hearing Summary: None

DATES OF
Present Review: 7/14/88
Last Review: 6/14/88
Inst TRD: N/A
Adm to Seg: 10/30/75
Prop Seg TRD: 1
If none — reason: Sentence Structure

Mr Rust requested that he be considered for placement in general population or that privileges be increased on D/R. A grievance was filed on this matter and is now on appeal to the Director.

Recommendations: None

Inmate in Attendance: Yes ☒ If no, state reason: _____
No ☐

SEGREGATION STATUS REVIEW COMMITTEE

<u>[Signature]</u> Chairman	AGREE DISAGREE	_____ MEMBER	AGREE DISAGREE
<u>[Signature]</u> MEMBER	AGREE DISAGREE	_____ MEMBER	AGREE DISAGREE

INSTITUTION CLASSIFICATION COMMITTEE

DATE: 7/14/88

[Signature]

[Signature] 7-15-88
CHIEF EXEC OFFICER DATE

APPROVE/DENY

Comments:

DISTRIBUTION: WHITE — RECORDS CANARY — UNIT SUPERVISOR PINK — INMATE
DCS-A-388 (1/88) (Replaces DCS-C-405)

GRIEVANCE FORM
Step One
CHIEF EXECUTIVE OFFICER

RECEIVED
JUL 22 1988
INSTRUCTIONS: IF MORE SPACE IS NEEDED USE ATTACHMENT SHEET IN TRIPLICATE

Exhibit 3
From: RUST, JOHN E. 30118
LAST NAME FIRST MIDDLE INITIAL NO

Part A—INMATE REQUEST

This grievance deals with my confinement in solitary confinement, the refusal and failure of the Housing Unit #4 Segregation Status Review Committee, the Nebraska State Penitentiary Institution Classification Committee to conduct an adequate and meaningful Segregation Status Review or Classification Hearing regarding my placement and ongoing confinement in Administrative Segregation Status due to my sentence structure. Also, the failure and refusal of each individual who are members of the Segregation-Status Housing Unit #4 Segregation Status Review Committee, Housing Unit #4 Team Classification Committee and the Nebraska State Penitentiary Institution Classification Committee to comply with and follow the Nebraska Department of Correctional Services' Classification System, Administrative Rules or Regulations, the NSP Operational Memorandums, State and Federal Laws, and the State and Federal Constitutions, in the following respects:

1. That the Nebraska Department of Correctional Services and the Nebraska State Penitentiary's policy and practice of retrospectively imposing solitary confinement upon me pursuant to Neb. Rev. Stat. §83-4,114 (Reissue 1987) and Rule 6(16) of Chapter 4 of the Nebraska Department of Correctional Services
- 20 June 1988 [Signature]

Part B—RESPONSE AND REASONS FOR DECISION REACHED

According to Operational Memorandum 201.002.101, Reception of Capital Inmates, capital inmates automatically will be placed on Administrative Detention status and housed on "D" Wing Housing Unit #4. Also, according to O/M 201.001.101, Unit Classification, you are being reviewed in accordance with the established institutional review schedule. Your requested relief is denied.

6-28-88
DATE

[Signature]
CHIEF EXECUTIVE OFFICER

ORIGINAL: TO BE RETURNED TO INMATE AFTER COMPLETION.

Attachment Sheet to
Step One Grievance Form
Chief Executive Officer
Page Two

#1164
RECEIVED

JUL 22 1988

NEBRASKA STATE
PENITENTIARY

Administrative Rules and Regulations violates the rights, privileges and immunities guaranteed me under the Separation of Powers Doctrine of the Bill of Attainder Clause and the Ex Post Facto Clause of Article I, Section of the United States Constitution, and the Due Process Clause of the Fourteenth Amendment to the United States Constitution since each of my four (4) concurrent criminal offenses were committed on or about 21 February 1975, which was fourteen to fifteen months prior to the 10 July 1976 effective date of Neb. Rev. Stat. §83-4,114 (Reissue 1987) and the subsequent interpretation, application and enactment of Rule 6(16) of Chapter 4 of the Nebraska Department of Correctional Services Administrative Rules and Regulations.

2. The Nebraska Department of Correctional Services and the Nebraska State Penitentiary policy and practice of confining me in solitary confinement pursuant to Neb. Rev. Stat. §83-4,114 (Reissue 1987) and Rule 6(16) of Chapter 4 of the Nebraska Department of Correctional Services Administrative Rules and Regulations violates the Cruel and Unusual Clause of the Eighth Amendment to the United States Constitution, as made applicable to the states by the Fourteenth Amendment thereto.

3. That I was not placed under the Departments Adult Inmate Classification system until March 1986 when the Housing Unit #4 Segregation Status Review Committee informed me of my placement under the Department's Adult Inmate Classification system via the Reclassification Action Form, and through the subsequent reclassification reviews held annually in February 1987 and February 1988.

4. That I have never been given any notice of a Director's Review Committee or Director's Classification Sub-Committee hearing, that I have never been allowed to appear before any Director's Review Committee or Director's Classification Sub-Committee regarding any Director's override or Director's Classification to place me on Death Row or Administrative Confinement Status, nor have I ever been informed that any Director's Review Committee or Director's Classification Sub-Committee convened and recommended that be placed on Death Row or Administrative Confinement Status pursuant to the Director's override provision or Director's Classification provisions of the Departments Adult Inmate Classification Manual.

5. That I have never been afforded any type of due process procedures, as required by the Nebraska Department of Correctional Services or the Nebraska State Penitentiary rules and regulation or the Departments Adult Inmate Classification Manual prior to or after my assignment to Death Row or Administrative Confinement Status.

20 June 1988

John E. Runt

Attachment Sheet to
Step One Grievance Form
Chief Executive Officer
Page Three

#116
RECEIVED

JUL 22 1988

NEBRASKA STATE
PENITENTIARY

6. That the Nebraska Department of Correctional Services and the Nebraska State Penitentiary's policy and practice of placing me in a control unit, assigned to Death Row or Administrative Confinement Status, due to my status of having been convicted of specific crimes which resulted in my sentence structure violates the Cruel and Unusual Punishment Clause of the Eighth Amendment, as made applicable to the states by the Fourteenth Amendment to the United States Constitution, and violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States.

7. That the members of the Segregation Status Review Committees have refused to conduct any adequate or meaningful review of my assignment to Death Row or Administrative Confinement Status for the possible recommendation to have me removed from segregated confinement status.

8. That the Nebraska Department of Correctional Services and the Nebraska State Penitentiary policy and practice is to keep me on Death Row or Administrative Confinement Status until I have completed my sentence or received another sentence.

9. That the Nebraska Department of Correctional Services or the Nebraska State Penitentiary does not have the legal authority to increase my sentences or to alter my sentences by imposing the additional punishment of solitary confinement

Relief requested: I want to be placed in the general population of the Nebraska State Penitentiary or in the alternative grant and afford me full access to both the Death Row yard and the dayroom of D Gallery, of Housing Unit #4, at times consistent with those of the inmates assigned to the general population of the Nebraska State Penitentiary.

20 June 1988
date

signature

Exhibit 4

**GRIEVANCE FORM
Step Two
CENTRAL OFFICE APPEAL**

INSTRUCTIONS:
TYPE OR USE BALL POINT
PEN IF MORE SPACE IS
NEEDED, USE ATTACHMENT
SHEET IN TRIPLICATE

From: RUST, JOHN E. 30118 NSP
LAST NAME FIRST MIDDLE INITIAL NO. INSTITUTION

***Part A-REASON FOR APPEAL:**

The chief executive officer failed to respond to or address each of the nine (9) points that I raised in my step One Grievance. That each of these specific nine (9) points raised specific violations of my constitutional rights when each individual, who are members of the Housing Unit #4 Segregation Status Review Committee, Housing Unit #4 Team Classification Committee, the Nebraska State Penitentiary Institution Classification Committee and the Nebraska State Penitentiary administration failed to or refused to comply with and follow the Nebraska State Penitentiary Department of Correctional Service's Classification System, the DCS and NSP Administrative Rules and Regulations, the NSP Operational Memorandums, State and Federal laws, and the State and Federal Constitutions. Therefore, the relief I requested should have been granted.

1 July 1988
DATE

John E. Rust
SIGNATURE

*THE COMPLETED INSTITUTIONAL GRIEVANCE FORM, INCLUDING THE CHIEF EXECUTIVE OFFICER'S RESPONSE, MUST ACCOMPANY THIS APPEAL.

Part B-RESPONSE AND REASONS FOR DECISION REACHED

You have not been placed in solitary confinement. Because you have been sentenced to death, your housing assignment is not within the general population of the Penitentiary. You are permitted to associate with other inmates who have sentences similar to yours. At this time, I do not intend to alter this Department's policy concerning housing assignments for inmates under sentence of death.

7/7/88
DATE

[Signature]
DIRECTOR

ORIGINAL: TO BE RETURNED TO INMATE AFTER COMPLETION.